IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF TEXAS
MARSHALL DIVISION

MARK T. EDDINGSTON, JEFFERY M. DAVIS, ELDRIDGE NICHOLAS BOLLICH, RAY A. COX, and GEORGE GALANIS, Plaintiffs, v. UBS FINANCIAL SERVICES INC., Defendant.	§ § § § § § § § § § § §	CIVIL ACTION NO. 2:12-CV-00422
 BILL HENDRICKS and AUBREY B. STACY, Plaintiffs, v. UBS FINANCIAL SERVICES INC., Defendant.	§ § § § § § § § § §	CIVIL ACTION NO. 2:12-CV-00606

UBS FINANCIAL SERVICES, INC.'S OPPOSITION TO
PLAINTIFFS' MOTION TO STRIKE TESTIMONY OF DEFENDANT'S EXPERTS

TABLE OF CONTENTS

Page

INTRODUCTION 1

BACKGROUND 1

ARGUMENT 2

I. UBS HAS FULLY COMPLIED WITH ITS DISCOVERY OBLIGATIONS 3

II. FEDERAL RULE 37(c)(1) DOES NOT JUSTIFY STRIKING UBS'S EXPERTS 6

III. PLAINTIFFS SHOULD NOT BE PERMITTED TO DESIGNATE A REBUTTAL WITNESS, NOR TO DELAY—OR BIFURCATE—THE JUNE 4 HEARING 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

Cases

Am. S. Ins. Co. v. Buckley,
748 F. Supp. 2d 610 (E.D. Tex. 2010).. 2

Brennan's Inc. v. Dickie Brennan & Co. Inc.,
376 F.3d 356 (5th Cir. 2004).. 6

Chicca v. St. Luke's Episcopal Health Sys.,
No. 10-2990, 2012 WL 651776 (S.D. Tex. Feb. 27, 2012).. 2

Cook v. Rockwell Int'l Corp.,
580 F. Supp. 2d 1071 (D. Colo. 2006).. 3

Dolin v. Contemporary Fin. Solutions, Inc.
No. 08-675, 2009 WL 4730465 (D. Colo. Dec. 8, 2009).. 3

Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.,
168 F.R.D. 61 (D.N.M. 1996).. 3

I.C.C. v. S. Ry. Co.,
543 F.2d 534 (5th Cir. 1976).. 4

Moody Nat'l Bank of Galveston v. GE Life & Annuity Assur. Co.,
383 F.3d 249 (5th Cir. 2004).. 4

Norton v. Assisted Living Concepts, Inc.,
786 F. Supp. 2d 1173 (E.D. Tex. 2011).. 4, 7

Weistock v. Midwestern Reg'l Med. Ctr.,
No. 07-1678, 2010 WL 1655449 (N.D. Ill. Apr. 23, 2010).. 7

Williams v. Toyota Motor Corp.,
No. 08-487, 2009 WL 305183 (E.D. Tex. Feb. 6, 2009).. 6

Rules

Fed. R. Civ. P. 26.. 3

Fed. R. Civ. P. 37(c)(1).. 7

INTRODUCTION

Pursuant to the Court's scheduling order, Defendant UBS Financial Services, Inc. ("UBS") timely designated its expert witnesses and provided expert reports on May 13. Plaintiffs designated no expert and provided no expert reports. Plaintiffs also declined UBS's offer to make the UBS experts available for deposition. Yet plaintiffs have now filed a motion to strike UBS's experts from testifying at the class certification hearing or, in the alternative, to allow plaintiffs to designate a rebuttal expert witness, based on the unsupported argument that they should have received certain information a few days earlier than they did.

The purpose of the plaintiffs' motion is clear: For whatever reason, plaintiffs elected not to designate an expert. They are now seeking to either deny UBS the benefit of the experts it timely identified, or to delay the June 4 hearing so they can find a late-designated expert of their own. And make no mistake: While plaintiffs frame the alternative relief they seek as an extension of the June 4 hearing for purposes of testimony by their expert only, what they seek in truth is to put off the hearing altogether, because argument on class certification cannot be heard if all the evidence is not in.

Plaintiffs' motion amounts to little more than dissatisfaction with the Court's schedule governing class certification, and an attempt to remedy their decision not to timely designate their own expert in compliance with that schedule. UBS respectfully submits that the motion should be denied.

BACKGROUND

On February 4, this Court issued its scheduling order laying out the schedule for class certification briefing and expert reports. *See* Pls. Mot. at 1. Plaintiffs were to designate any expert and serve any expert report by April 22. On that day, plaintiffs' counsel informed counsel for UBS that they did not intend to designate an expert witness. (Three days before, on April 19, plaintiffs had served a Second Request for Production on UBS, which for the first time requested transaction data for the PartnerPlus Plans, in addition to numerous other broad document requests. These Requests were served a full 11 days after UBS filed its opposition to class certification.) In accordance with this Court's scheduling order, on May 13 UBS served plaintiffs with the expert reports of Dr. Laura Simmons and Alan Johnson. At the same time, UBS offered to make Dr. Simmons and Mr. Johnson available for deposition. Plaintiffs declined. On May 18, less than five days after serving its expert reports, UBS provided plaintiffs with a compact disc containing all of the transaction data and other information relied on by Dr. Simmons in preparing her reports. The transaction data covered every participant in the PartnerPlus Plans, and information that was not used in Dr. Simmons's analysis had to be redacted to protect participant privacy.[1]

Separately, and as discussed below, UBS has continued to review and produce thousands of documents on an expedited basis.

ARGUMENT

The Court does not need to resort to Wright & Miller to know that "motions to strike are disfavored and infrequently granted." *Am. S. Ins. Co. v. Buckley*, 748 F. Supp. 2d 610, 626 (E.D. Tex. 2010) (Clark, J.); *see also Chicca v. St. Luke's Episcopal Health Sys.*, No. 10-2990, 2012 WL 651776, at *1 (S.D. Tex. Feb. 27, 2012). UBS has fully complied with the Court's scheduling order and the Federal Rules governing expert reports, and plaintiffs have not shown the wrongful conduct and prejudice that would justify the extraordinary remedy of striking witnesses, or of altering this Court's scheduling order at this late date.

[1] The documents relied on by Mr. Johnson were either publicly available, previously produced by UBS or plaintiffs, or deposition transcripts which were available to all parties.

I. UBS HAS FULLY COMPLIED WITH ITS DISCOVERY OBLIGATIONS

Plaintiffs complain that UBS failed to timely produce certain data relied on by its experts. The rule governing expert discovery—Rule 26(a)(2)(B)(ii)—provides that a party wishing to present an expert witness must provide "a written report—prepared and signed by the witness" that contains "the facts or data considered by the witness." Plaintiffs seek to transform this Rule into a requirement that a party "provide [the] supporting data when it designated its experts and provided the reports." Pls' Mot. at 2. Rule 26(a)(2)(B)(ii), however, does not require an actual and contemporaneous production. Rather, as the court explained in *Dolin v. Contemporary Fin. Solutions, Inc.*:

> It is sufficient [] to provide in the expert report a listing of the data and other information considered by the expert, which must be provided or otherwise made available for inspection upon request. ***The rule does not require that all data or other information considered by the expert must be copied and physically provided with the report.***

No. 08-675, 2009 WL 4730465, at *2 (D. Colo. Dec. 8, 2009) (emphasis added); *see also Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071, 1121–22 (D. Colo. 2006) (holding that the report need not "contain, or be accompanied by, all of the expert's working notes or recordings"); *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61, 62 (D.N.M. 1996) ("[I]t is clear that all documents provided to a party's expert witness must be produced *on request*.") (emphasis added).

Plaintiffs' erroneous reading of the Rule is also refuted by the Advisory Committee's Note to Rule 26(a)(2)(B)(ii), which explains that the purpose of the Rule is to ensure the disclosure of "information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." Fed. R. Civ. P. 26 advisory committee's notes (1993); *see also Moody Nat'l Bank of Galveston v. GE Life & Annuity Assur.*

Co., 383 F.3d 249, 253 (5th Cir. 2004) ("Advisory Committee Notes . . . are instructive in determining Congress's intent"). The Rule does not require immediate production, as plaintiffs contend, but rather is meant to guarantee that parties are given adequate time to review the material. Here, the Court's schedule did not contemplate nor permit rebuttal experts, and the only non-public data or information relied on in the expert reports was produced more than two weeks before the June 4 hearing—ample time for plaintiffs to review and prepare.[2]

Failing to demonstrate any violation of the expert discovery Rule, plaintiffs fall back on the argument that UBS violated its general discovery obligations under Rules 26(a)(1)(A) and 34. Pls. Mot. at 2–3. But the general discovery obligations do not apply to this expert dispute—the more specific Rule 26(a)(2)(B)(ii), governing expert discovery, prevails over the general rule. *See I.C.C. v. S. Ry. Co.*, 543 F.2d 534, 539 (5th Cir. 1976). Indeed, if plaintiffs' theory were correct—that the general rules of discovery required disclosure of all information relied upon by experts early in the process of expert analysis—it would constitute a fundamental rewriting of expert discovery requirements that the Advisory Committee obviously gave detailed and thoughtful consideration.

Plaintiffs' reliance on the initial disclosure requirements of Rule 26(a)(1)(A) is especially misplaced, because under the Court-ordered schedule in this case the parties made no Rule 26(a)(1)(A) disclosures. It is thus baseless for plaintiffs to accuse UBS of failing to meet its obligations to update its Rule 26(a) initial disclosures when there were no disclosures to update.

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[2] As noted, many of the documents relied on by Mr. Johnson were either publicly available, previously produced by UBS or plaintiffs, or deposition transcripts which were available to all parties. *See Norton v. Assisted Living Concepts, Inc.*, 786 F. Supp. 2d 1173, 1189 (E.D. Tex. 2011) (holding that a party had no "obligation to produce the document back to [the other party] after receiving it from" them).

Rather, plaintiffs, like UBS, have produced documents and information in response to written discovery only.

Moreover, plaintiffs have not acted in accordance with the interpretation of Rule 26(a)(1) that they advance in their motion. For example, on May 17 plaintiffs served supplementary interrogatory responses and a witness list for the June 4 hearing that named individuals who plaintiffs had not previously identified as possessing information that would support their case, as would have been required by Rule 26(a)(1)(A)(i). *Compare* Warr Decl., Ex. A at No. 2 *with* Warr Decl., Ex. B at Nos. 2, 10 *and* Warr Decl., Ex. C. Plainly, plaintiffs have not understood the Rule to apply in the manner that their motion now suggests.

UBS has, in fact, timely responded to all of plaintiffs' discovery requests. On an extremely tight timeline, UBS collected documents and electronically stored information from six custodians who have primary responsibility for the PartnerPlus Plans covering a period of *seventeen years*. Through this protocol—to which plaintiffs' counsel agreed—UBS collected almost 25,000 documents. And it continues to review and produce thousands of documents in response to plaintiffs' document production requests. Indeed, UBS even expedited production of certain categories of documents at plaintiffs' request. Plan transaction data was not one of the categories that plaintiffs identified.

Plaintiffs' argument that UBS violated its discovery obligations by not providing them with the documents considered by Dr. Simmons and Mr. Johnson when they "requested . . . any and all documents pertaining to the applicability of ERISA to the PartnerPlus" Plans (Pls. Mot. at 2) is specious. This request was served on UBS on February 14 as part of plaintiffs' First Requests for Production. *See* Ex. D at No. 5. UBS promptly provided objections and responses to those Requests; it objected to this specific request on the grounds that it was overly broad, unduly burdensome, and vague. *See* Warr Decl., Ex. E at No. 5. It was not until April 19 that counsel for UBS received a letter detailing plaintiffs' perceived deficiencies in UBS's responses to their First Requests for Production, along with a new and more specific request for documents, including a request that UBS produce the transactional data pertaining to the PartnerPlus Plans. *See* Warr Decl., Exs. F, G. Plaintiffs did not seek to expedite UBS's response to the new document request. And plaintiffs acknowledge that UBS produced that information on May 18, 2013—a full four days before any response to the request was due pursuant to Rule 34(b)(2)(A).

UBS has worked with exceptional diligence in a short time period to identify, review, and produce to plaintiffs thousands of documents—many before the time UBS was required to produce them under the Rules. Plaintiffs' claim that production was delayed is groundless.

II. FEDERAL RULE 37(c)(1) DOES NOT JUSTIFY STRIKING UBS'S EXPERTS

Plaintiffs fail to cite a single case justifying their request that this Court take the extraordinary action of striking UBS's expert reports, and in fact the request is groundless. *First*, Rule 37(c)(1) authorizes court-order sanctions only when there has been a violation of a party's obligations under Rule 26(a) or (e). But there has been no failure on UBS's part at all, as shown above. *Second*, courts have regularly permitted expert witnesses to testify after not only substantial delays, but after the close of discovery and scheduling deadlines. *See Brennan's Inc. v. Dickie Brennan & Co. Inc.*, 376 F.3d 356, 375 (5th Cir. 2004) (affirming trial court's refusal to exclude expert after expert had failed to provide supplemental data until trial); *Williams v. Toyota Motor Corp.*, No. 08-487, 2009 WL 305183, at *3-4 (E.D. Tex. Feb. 6, 2009) (Schell, J.) (permitting an expert witness to testify who was not designated until two days after the deadline for designation of witnesses). This Court should not take the extreme step of striking witnesses based on a putative 5-day delay, particularly when, in fact, there was no delay at all.

Third, plaintiffs have neither suggested, much less attempted to show, that they were prejudiced from having received the underlying transaction data for the PartnerPlus Plans five days after the reports were served. *See* Fed. R. Civ. P. 37(c)(1) (no relief when purported discovery failure was "harmless"); *Weistock v. Midwestern Reg'l Med. Ctr.*, No. 07-1678, 2010 WL 1655449, at *3-4 (N.D. Ill. Apr. 23, 2010) (refusing to exclude testimony of expert who withheld supporting information for nearly two months, since complaining party had suffered "little, if any, prejudice"); *see also Norton*, 786 F. Supp. 2d at 1189 (denying motion to strike evidence that was not produced until two months after the close of discovery).

Finally, it is worth noting once again that despite their purported concern with the expert reports and the underlying transaction data, plaintiffs declined the opportunity to even depose Dr. Simmons and Mr. Johnson.

III. PLAINTIFFS SHOULD NOT BE PERMITTED TO DESIGNATE A REBUTTAL WITNESS, NOR TO DELAY—OR BIFURCATE—THE JUNE 4 HEARING

Finally, plaintiffs argue that if this Court denies their request to strike UBS's experts, it should instead afford them the opportunity to designate a rebuttal expert witness and "partially continu[e the] certification hearing" so their witness can testify later. Pls. Mot. at 1. What they actually seek is a full continuance of the hearing, since the Court scheduled the hearing for purposes of argument and decision on class certification, which cannot occur if all the evidence is not in. Moreover, it would be enormously prejudicial to UBS if plaintiffs were permitted to call and cross-examine UBS's experts and other witnesses on June 4 as they seek to do, and then have the luxury of preparing a rebuttal report afterward and presenting their witness at a later date.

This Court should deny plaintiffs' alternative request. The schedule in this case has been clear for more than three months, and it does not provide for rebuttal experts. In other words, even if plaintiffs' motion had identified prejudice that resulted from UBS's purported 5-day delay (it did not), the prejudice could only have been in connection with a rebuttal expert that the schedule does not provide for and that plaintiffs did not request until more than a week after receiving UBS's expert reports, and more than four weeks after their expert was to be identified.

Finally, in no event should the Court conduct an initial and partial hearing on June 4, giving plaintiffs the opportunity to then tailor their expert report and expert strategy afterward.

CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' Motion to Strike Testimony of Defendant's Experts.

Date: May 25, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served on all counsel of record via the Court's CM/ECF system the foregoing Defendant UBS Financial Services, Inc.'s Opposition to Plaintiffs' Motion to Strike Testimony of Defendant's Experts pursuant to Local Rule CV-5(a)(7)(C) on May 25, 2013.

/s/ Eugene Scalia
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